IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.767 OF 2004

IN

SUIT NO.3709 OF 2003

1. Lok Housing & Constructions Ltd. & another. ... Plaintiffs.

vs.

Everest Industries Limited. .... Defendants.

---

Mr.Zal Andhyarujina i/b. M/s.Udwadia & Udeshi, for Plaintiffs

Mr.V.V.Tulzapurkar with Firoz Palkhiwala i/b. G.R.Mehta, for Defendants.

**CORAM: D.K.DESHMUKH,J**.

**DATED: 4th August,2005**

**P.C**.:-

1. This is a notice of motion taken out by the defendants under Order 7 Rule 11 of the Civil Procedure Code for rejection of the plaint. According to the defendants, the plaint does not disclose any cause of action. According to the plaintiffs, the entire cause of action which is pleaded is that

there was previous litigation between the parties in relation to the suit property, in that litigation ultimately an Award was made by the Arbitrator. Both the parties had filed the proceedings for execution of the Award. At that time, according to the averments in the plaint, in consideration of the plaintiffs' claim for damages and for compromising the existing litigation i.e. the chamber summons, the defendants had promised to give to the first and second plaintiff a fair opportunity to bid in the property of the defendants. According to the defendants, this does not give any cause of action to the plaintiffs against the defendants which is a company incorporated under the Companies Act. It is further submitted that the averments made in the plaint that promise to give fair opportunity to bid for the property was an implied term of the consent terms entered into between the parties, is contrary to the recital in the consent terms. It is submitted that though the suit is filed for specific performance of the promise alleged to have been made by the defendants, in the plaint nowhere what was the exact nature of the promise is explained. The learned Counsel for Defendants relied on three judgments in support of his contention that the plaint not disclosing cause of action, has to be rejected by the Court in exercise of its power under Order 7 Rule 11 of Civil Procedure Code. The judgments are (i) AIR 1977 Supreme Court 2421, T. Arivandandam V. T.V.Satyapal & another, (ii) (1998) 2 Supreme Court Cases 70, I.T.C. Limited Vs. Debts Recovery Appellate Tribunal & others, (iii) (2004) 3 Supreme Court Cases 137, Sopan Sukhdeo Sable Vs. Asstt. Charity Commissioner and others. On behalf of the plaintiffs, it is submitted that suit can be filed for enforcement of the promise

made. It is pointed out that as per the averments in the plaint, the Directors of the Defendant-company had made a promise and therefore, that promise is binding on the Defendants. It is further submitted that the recitals in the consent terms were not related to the suit property and it relates to some other property and it did not relate to sale of the property of the defendants which is the subject matter of the dispute. There can be no debate that if the Court is satisfied that the plaint does not disclose the cause of action, the Court is not only justified but also under a duty to reject such a plaint. The averments which are relevant for the present purpose and which are also relied upon by the plaintiffs disclosing the cause of action are in paragraph 3 (xxi) and (xxii) of the plaint. The paragraphs 3(xxi) and (xxii) read as under:-

> "3(xxi) The Plaintiffs say that at the meeting held on 18th September,2003 attended by all the aforesaid persons except the said Sanghi, ML Gupta and A.K.Jain, on behalf of the Defendant, represented to Lalit Gandhi, the Chairman and Managing Director of the 1st Plaintiff and Janak Mehta, Constituted Attorney of the 2nd Plaintiff, that if the 1st Plaintiff refrained from suing the Defendant, and withdrew the existing proceedings filed against it and/or had the same disposed of on certain terms and conditions, it would give the 1st and /or the 2nd Plaintiff a fair opportunity to bid for the property.
>
> (xxii) The Plaintiff says that as the property has

great development potential, especially to the 1st Plaintiff who was already developing the neighbouring residential land, and to avoid the time and expense involved in litigation, the 1st Plaintiff, further to the Defendants representation refrained from suing it and agreed to enter into consent terms to dispose of the said pending proceedings. “

The reliefs that are claimed in the plaint are as under:-

“A. For an order directing the Defendant to give the 2nd Plaintiff a fair opportunity to bid for the property by:

(a) clarifying the ambiguities in the prescribed format of the required Bank guarantee and granting reasonable time thereafter to the 2nd Plaintiff to furnish such prescribed bank guarantee; and

(b) thereafter considering the 2nd Plaintiff's offer, and in the event of its offer being the highest accepting the same and doing all necessary acts and deeds to sell the property to it.

B For an order and injunction restraining the Defendant from selling, giving for development, or in any manner transferring, disposing of and/or dealing with the property till such time as the Defendant furnishes the said

> clarifications and the expiry of reasonable time thereafter as prayed for above;"

From perusal of the paragraphs quoted above and the prayer clauses, it is clear that the suit has been filed to enforce the promise which is alleged to have been made by the Directors of the Defendant-Company. It is an admitted position before me that there is no averments made in the plaint that the Directors of the Defendant-Company who have attended the meeting as alleged in the plaint, with the office bearers of the plaintiffs were authorised by the Defendant-company to make the promise on behalf of the Defendant-company. In the absence of the averments that the Defendant-company had authorised them to make promise on its behalf, even if it is assumed that the Directors made promise on behalf of the Defendants-company, the promise will not bind the Defendant-company. It is pertinent to note here that it is clear from the averments quoted above from the plaint that according to the plaintiffs the alleged clause that a fair opportunity was to be given to bid for the property to plaintiff nos. 1 and 2, was an implied term in the consent terms that were filed. The contents in Paragraph no.10 of the Consent Terms are relevant which read as under:-

> "Such payment shall be in full and final settlement of all the above mentioned three claims which the Respondent may have against the Claimant. It is clarified that on payment of the said sum, and signing of this consent terms

> the respondent and the claimant give up and shall not have or raise any further claims against each other of any nature whatsoever."

Perusal of the above quoted paragraph no.10 of the consent terms show that there is clear statement made that the payment that is to be made will put to an end to all the claims of the parties and they shall not raise any further claims against each other of any nature whatsoever. Even assuming that the plaintiffs have rightly contended that the above quoted recital in the consent terms related to some other property, in my opinion, in view of the averments in the plaint that the promise to grant fair opportunity to bid for the property to the plaintiff nos. 1 and 2 was an implied term of the consent terms, the plaintiffs were under an obligation to plead how the above quoted recitals were made in the consent terms and as to why the recitals did not relate to the property which is the subject matter of the present suit. It is further to be seen that the promise that plaintiffs are seeking to enforce is that "it would give the 1st and/or the 2nd plaintiff a fair opportunity to bid for the property." It is settled law that when the Court enforces a promise, the Court has to be satisfied that the promise that is sought to be enforced is specific, clear and unambiguous. If the Court comes to the conclusion that the promise is ambiguous or vague even if it is satisfied that at some time such type of promise is made, the Court can refuse to enforce the promise which is vague. Therefore, the plaintiffs should have disclosed what was the exact nature of the promise that was made. However,

the plaint does not give any particulars of the alleged promise. The Supreme Court has laid it down in the judgments referred to above that if the plaint does not disclose any real cause of action, the plaint is liable to be rejected. From the perusal of the plaint it appears that the entire exercise is undertaken by the plaintiffs to stall the process of sale of the property by the defendants. In these circumstances, therefore, in my opinion, as it is clear that the plaint does not disclose any real cause of action, the plaint is liable to be rejected. In this view of the matter therefore, the notice of motion is granted in terms of prayer clause (a). Notice of Motion is disposed of.

---